contractual commitments with non-Member States or under the auspices of international organizations. In so far as this power has been exercised by the Community, the provisions adopted by it preclude any conflicting provisions by the Member States. On the other hand, so long as the transitional period laid down in Article 102 of the Act of Accession has not expired and the Community has not yet fully exercised its power in the matter, the Member States are entitled, within their own jurisdiction, to take appropriate conservation measures without prejudice, however, to the obligation to co-operate imposed upon them by the Treaty, in particular Article 5 thereof.

4. The rules regarding equality of treatment enshrined in Community law forbid not only overt discrimination but also covert forms of discrimination by reason of nationality which, by the application of other criteria of differentiation, lead in fact to the same result.

5. National measures are contrary both to Article 7 of the EEC Treaty and to Article 2 (1) of Regulation No 101/76 if, by selecting a criterion based on the size and engine power of the boats, they have the effect of excluding from the fishing areas coming under the sovereignty or within the jurisdiction of the Member State in question, a part of the fleets of other Member States whereas under the same measures no comparable obligation is imposed on its own nationals.

In Case 61/77

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, John Temple Lang, acting as Agent, with an address for service in Luxembourg at the offices of its Legal Adviser, Mario Cervino, Jean Monnet Building, Kirchberg,

applicant,

supported by

KINGDOM OF THE NETHERLANDS, represented by G. W. Maas Geesteranus, Legal Adviser at the Ministry for Foreign Affairs, acting as Agent, assisted by M. J. Kuiper, principal administrator in the Legal Advisers' Department of the Ministry for Agriculture and Fisheries, with an address for service in Luxembourg at the Netherlands Embassy,

intervener,

v

IRELAND, represented by Liam J. Lysaght, Chief State Solicitor, acting as Agent, assisted by R. J. O'Hanlon, S.C., with an address for service in Luxembourg at the Irish Embassy,

defendant,

APPLICATION for a declaration that, by introducing certain restrictive measures in the sea fisheries sector, Ireland has failed to fulfil its obligations under the EEC Treaty,

THE COURT

composed of: H. Kutscher, President, M. Sørensen and G. Bosco, Presidents of Chambers, A. M. Donner, P. Pescatore, Lord Mackenzie Stuart and A. O'Keeffe, Judges,

Advocate General: G. Reischl
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and issues

The facts, the procedure and the conclusions, submissions and arguments of the parties may be summarized as follows:

I — Facts

On 20 October 1970, the Council of the European Communities adopted, in application in particular of Articles 42 and 43 of the EEC Treaty, Regulation (EEC) No 2142/70 on the common organization of the market in fishery products (OJ, English Special Edition 1970 (III), p. 707) and Regulation (EEC) No 2141/70 laying down a common structural policy for the fishing industry (OJ, English Special Edition 1970 (III), p. 703).

Articles 98 to 103 of the Act concerning the Conditions of Accession and the Adjustments to the Treaties annexed to the Treaty, known as 'the Accession Treaty' of 22 January 1972, contain provisions relating to fisheries. In particular, Article 102 provides that the Council, acting on a proposal from the Commission shall determine, from the sixth year after accession at the latest, conditions for fishing with a view to ensuring protection of the fishing grounds and conservation of the biological resources of the sea.

On 19 January 1976, the Council adopted Regulation (EEC) No 100/76 on the common organization of the market in fishery products (OJ L 20, p. 1) and Regulation (EEC) No 101/76 laying down a common structural policy for the fishing industry (OJ L 20, p. 19). The first of those regulations repeals Regulation No 2142/70 and the second Regulation No 2141/70.

On 8 October 1976 the Commission submitted to the Council a proposal for a regulation establishing a Community system for the conservation and

management of fishery resources (OJ C 255, p. 3).

At its meeting on 30 October 1976 in The Hague, the Council adopted and formally approved on 3 November 1976 a resolution to the effect that as from 1 January 1977 the Member States would, by means of concerted action, extend the limits of their fishing zones to 200 miles off their North Sea and North Atlantic coasts and that as from the same date the exploitation of fishery resources in these zones by fishing vessels of third countries would be governed by agreements between the Community and the third countries concerned. The Council accordingly instructed the Commission forthwith to start negotiations with the third countries concerned in accordance with the Council's directives and decided on concerted action by the Member States for the purpose of future proceedings of the international fisheries bodies, in particular the International Commissions for North-West Atlantic Fisheries, North-East Atlantic Fisheries and South-East Atlantic Fisheries.

On the same occasion the Council approved a statement of the Commission (Annex VI to the resolution) in the following terms:

Pending the implementation of the Community measures at present in preparation relating to the conservation of resources, the Member States will not take any unilateral measures in respect of the conservation of resources.

However, if no agreement is reached for 1977 within the international fisheries Commissions and if subsequently no autonomous Community measures could be adopted immediately, the Member States could then adopt, as an interim measure and in a form which avoids discrimination, appropriate measures to ensure the protection of resources situated in the fishing zones off their coasts.

Before adopting such measures, the Member State concerned will seek the approval of the Commission, which must be consulted at all stages of the procedures.

Any such measures shall not prejudice the guidelines to be adopted for the implementation of Community provisions on the conservation of resources.

In a resolution on certain aspects of the internal fisheries system, the Council considered that the reconstitution and protection of stocks in order to permit an optimum yield from potential Community resources required strict control and Community-wide measures to that end. It recognized that the protection and the control of the fishing zone off Ireland must not result, because of the size of that zone, in a charge, for that Member State, which was disproportionate to the volume of the Community fish resources which could be exploited in that zone by the fishermen of that Member State and agreed that the implementation of available means of surveillance or those to be foreseen must be accompanied by appropriate measures to ensure that the charges which ensued would be shared equitably. Having regard to the economic relationships characterizing fishing activity in Ireland, the Council declared its intention so to apply the provisions of the Common Fisheries Policy, as further determined by the Act of Accession, and adapted to take account of the extension of waters to 200 miles, as to secure the continued and progressive development of the Irish fishing industry on the basis of the Irish Government's Fisheries Development Programme for the development of coastal fisheries.

Finally, the Council took note of unilateral statements concerning its resolution on certain aspects of the internal fisheries system, and in particular of a unilateral statement by

the Irish Government; according to the latter statement, the continued and progressive development of the Irish fishing industry can be secured only by the establishment of an exclusive coastal belt of up to 50 miles and agreement on the coastal belt issue is a precondition to the adoption of new directives by the Council for substantive agreements with third countries on reciprocal fishing rights.

The fisheries problem was again discussed by the Council on 15 and 16 December 1976, when the Irish Minister for Foreign Affairs stated that if early agreement was not reached on conservation measures, it would be necessary for Ireland to take such measures unilaterally.

On 3 December 1976, the Commission submitted to the Council a proposal for a regulation laying down interim measures for the conservation and management of fishery resources. These interim provisions were to apply until the entry into force of the Community system and until 31 December 1977 at the latest. Article 2 of the proposed regulation provided that Member States were to refrain from taking unilateral measures for the conservation of fishery resources.

On 13 December 1976, the Irish Government proposed additional interim measures, considered necessary for the attainment of its Fisheries Development Programme. Among these additional interim measures was in particular the exclusion of fishing boats of over 85 feet (registered length) and/or 1 000 horse-power from an area extending 20 miles from the Irish base-lines. The Irish Government indicated that the measures which it was proposing were without prejudice to the final arrangements which must in its view include a coastal conservation zone of up to 50 miles.

At its meetings on 13 December 1976 and 20 December 1976 the Council failed to reach agreement on the interim conservation measures to apply pending introduction of a permanent Community regime. At that meeting the Irish Minister for Foreign Affairs indicated that his government would bring into operation from 1 January 1977 conservation measures to avoid over-exploitation of fish stocks in Irish waters.

On 20 December 1976 the Commission submitted to the Council a supplementary proposal for a regulation on conservation measures.

On 14 January 1977, the Commission submitted to the Council a further proposal for a regulation defining certain interim fisheries resource conservation measures.

Article 1 (1) of that proposal provided that the right to fish in certain zones located within 12 nautical miles from the base-lines of the Member States may be limited to vessels not exceeding 85 feet in length or an engine power of 1 000 horse-power.

At its meeting on 18 January 1977, the Council was unable to reach agreement on the Commission's draft regulations, which the Irish Government considered inadequate.

At the meeting of the Council of Foreign Ministers on 8 and 9 February 1977, the Irish Government confirmed its intention of taking national conservation measures for fishery resources if Community decisions were not taken.

By a telex message of 11 February 1977, the Commission drew the attention of the Irish Government to the fact that The Hague Declaration provides that before adopting conservation measures, the Member State concerned must seek the approval of the Commission which must be kept informed of all the stages of those procedures.

By a letter of 14 February 1977, the Permanent Representation of Ireland to the Communities transmitted to the

Commission a communication from the Minister for Foreign Affairs of Ireland announcing that his Government was obliged to take unilateral conservation action.

On 16 February 1977, the Irish Minister for Fisheries made two orders concerning sea fisheries. The first, the Sea Fisheries (Conservation and Rational Exploitation) Order 1977, makes it an offence for any sea fishing boat to enter and remain and to fish in a maritime area situated within that portion of the exclusive fishery limits of Ireland which lies South of the parallel of 56° 30' North latitude, East of the meridian of 12° West longitude and North of the parallel of 50° 30' North latitude. It is also an offence under the order for any person on a sea fishing boat to fish or to attempt to fish in the area in question or for such a vessel to have fish on board unless the fishing was in accordance with law, or for the boat not to keep its fishing gear stowed away while in the area.

The second, the Sea Fisheries (Conservation and Rational Exploitation) (No 2) Order 1977 exempts from the foregoing prohibition any sea fishing boat not exceeding 33 metres in registered length or having a main engine or engines not exceeding a total of 1 100 brake horse-power.

On 18 February 1977 the Council adopted Regulation (EEC) No 350/77 laying down certain interim measures for the conservation and management of fishery resources (OJ L 48, p. 28).

On 21 February 1977 a meeting was held between the representatives of the Commission, the Irish Government and the other Member States concerning the unilateral conservation measures envisaged by the Irish Government.

By letter of 22 February 1977, the Commission asked the Irish Government to postpone the date of application of the measures in question at least until 15 March.

On 11 March 1977, the Commission submitted to the Council a proposal for a regulation fixing catch quotas for certain zones and procedures relating to fishing activity in those zones. It was impossible for the Council of Ministers for Agriculture to reach unanimous agreement on that proposal at its meeting on 26 and 27 March 1977.

At its meeting on 25 March 1977, the Council discussed the revised Commission proposals which, although acceptable as interim measures to Ireland and the other Member States, were not acceptable to the United Kingdom.

By a communication of 4 April 1977, the Irish Government informed the Commission that the unilateral measures upon which it had decided would come into force from 10 April and that Member States would be invited to submit fishing plans to it for approval with a view to the later introduction of a scheme on the lines proposed by the Commission.

By letter of 2 May 1977, the Commission initiated against Ireland the procedure laid down in Article 169 of the EEC Treaty. In that letter it stated that Ireland had failed to fulfil the obligation incumbent on it under Community law, by introducing and applying measures which were in practice discriminatory and which were inappropriate for their alleged purpose of conservation. Accordingly, the Irish Government was requested to submit its observations to the Commission before 6 May 1977.

On that date, the Irish Government submitted to the Commission its observations on its alleged failure to fulfil its obligations. The Commission did not regard the observations as satisfactory and on 7 May 1977 delivered the reasoned opinion referred to in Article 169 of the EEC Treaty.

By a telex message of 10 May 1977, the Irish Government denied that it had

failed to fulfil its obligations and reiterated its view that in the absence of an agreement on conservation measures at Community level, the measures taken by it were necessary in the interests of conservation of fish stocks in the waters to which they applied.

II — Written procedure

By application lodged on 13 May 1977, the Commission brought before the Court, in pursuance of the second paragraph of Article 169 of the EEC Treaty, the alleged failure of Ireland to fulfil its obligations in the area of fishery conservation.

On the same date, 13 May 1977, the Commission, in pursuance of Article 186 of the EEC Treaty and of Article 83 of the Rules of Procedure, submitted an application for the adoption of interim measures in which it requested the Court to:

(a) prescribe that the Government of Ireland should formally suspend the Irish measures; or

(b) if the Court prefers, prescribe that the Government of Ireland should formally suspend the Irish measures to the extent appropriate to give effect to the arrangement outlined in the application.

By order of 13 May 1977, the President of the Court in application of the first paragraph of Article 85 of the Rules of Procedure, decided to refer to the Court the decision on the interim measures.

The Government of Ireland submitted its written observations on 18 May 1977 and the parties presented oral argument and replied to questions put by the Court at the hearing on 21 May 1977. The Advocate General delivered his opinion at a second hearing on the same date.

By order of 22 May 1977 ([1977] ECR 937) the Court, as an interlocutory measure, deferred a decision on the application submitted by the Commission under Article 186 of the Treaty, adjourned the resumption of the hearing to 22 June and ordered the parties to make a written report by 18 June 1977 on the result of their negotiations.

On 18 June 1977, the parties submitted to the Court a joint report and requested an extension of the date fixed by the Court for the re-opening of the oral procedure.

The Court, considering upon examination of that report that 'the dispute might be amicably settled with the co-operation of all the Member States having fishing interests in the sea area affected by the Irish measures', deferred the hearing by order of 21 June 1977 and reserved the decision as to the course the procedure was to take until it had examined a second report to be submitted by the parties by 1 July 1977 at the latest.

By order of 22 June 1977 the Court, in application of the first paragraph of Article 37 of the Protocol on the Statute of the Court of Justice of the EEC, took note of the intervention of the Kingdom of the Netherlands in support of the submissions of the Commission.

In a second joint report submitted on 1 July 1977, the Irish Government and the Commission explained the difficulties which they were experiencing in obtaining from the Member States concerned all the details necessary for the working out of fishing plans to replace the measures in dispute. The Irish authorities particularly emphasized that they were unable to make a decision on such plans before knowing all the technical details.

Consequently, the parties in the main action requested a further extension of the period fixed by the Court.

The Court acceded to that request and fixed the resumption of the hearing at 11 July 1977.

On 8 July 1977, the Commission submitted a report in which it declared that it was impossible for it to reach agreement with the Irish Government on the fishing plans under discussion by the parties.

On 9 July 1977, the Irish Government submitted a report in which it drew attention to the fact that there had just been a change of government and requested a 'substantial' adjournment of the Commission's application for interim measures.

The parties in the main action and the intervener presented oral argument and answered questions put by the Court at the hearing on 11 July 1977. The Advocate General delivered a further opinion at a second hearing on the same date.

On 13 July 1977 the Court, as an interlocutory measure ([1977] ECR 1411), ordered as follows:

1. Ireland shall suspend by 0.00 hours GMT on 18 July 1977 at the latest and until judgment has been given in the main action, the application, to fishing boats registered in any of the Member States, of the orders of the Minister for Fisheries entitled the Sea Fisheries (Conservation and Rational Exploitation) Order 1977 and the Sea Fisheries (Conservation and Rational Exploitation) (No 2) Order 1977.
2. Until judgment has been given in the main action Ireland may, with the consent of the Commission, adopt in the sea areas within its jurisdiction any other measures intended to ensure the protection of fish stocks which are in accordance with the provisions of Community law and with the objectives of the common fisheries policy.
3. Costs are reserved.

The written procedure in the main action followed the normal course.

After hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

It requested the Irish Government and the Commission however to give written replies to several questions before the hearing. This request was complied with within the prescribed period.

III — Conclusions of the parties

The *Commission* claims that the Court should:

— Declare that by introducing the disputed unilateral measures in the area of fishery conservation, the Government of Ireland has failed to fulfil an obligation imposed on it by the Treaty; and

— Order the Government of Ireland to pay the costs of the proceedings.

The *Government of the Kingdom of the Netherlands,* intervener, claims that the Court should:

— Declare that by introducing the disputed unilateral measures Ireland has failed to fulfil an obligation imposed on it by the EEC Treaty;

— Require the defendant to bear the costs of the proceedings.

The *Government of Ireland* contends that the Court should:

— Reject the Commission's application;

— Order the applicant to pay the costs including the costs of the application for interim measures.

In its observations submitted in relation to the memorial filed by the Kingdom of the Netherlands, the Irish Government contends moreover that the Court should:

— Decline to accept the submission made by the intervener;

— Decree payment by the intervener of all additional costs arising in the proceedings by reason of its intervention.

IV — Submissions and arguments put forward by the parties during the written procedure

A — General observations

The *Commission* declares that it recognizes the need for measures of conservation of sea fisheries and for the special position of Ireland to be taken into account owing in particular to the fact that the Irish fishing fleet, unlike the fishing fleets of almost all the other Member States, is composed almost exclusively of small inshore fishing boats. It recalls the principles of Community law applicable in the fisheries sector, which were laid down in particular by Council Regulations Nos 100/76 and 101/76 of 19 January 1976 and by the case-law of the Court of Justice, in particular the judgment of 14 July 1976 in Joined Cases 3, 4 and 6/76 *(Cornelis Kramer and Others,* [1976] ECR 1279). It follows from that judgment that national fisheries measures are compatible with Community law only if they comply with three tests: they do not lead to differences in treatment of fishing boats of other Member States and do provide equal conditions of access; they are so designed as to keep their effect on the functioning of the common Community fisheries policy to the minimum; and they are, objectiveley considered, real conservation measures. Moreover, the Member States are not free to adopt any measures, even measures having a legitimate objective, which interfere more than is necessary with the operation of Community policies.

In view of these principles, it is necessary to state that the orders of 16 February 1977 issued by the Irish Minister for Fisheries are incompatible with Community law because of their discriminatory effect and because they are not, objectively considered, reasonable conservation measures. In addition, they affect the negotiations in progress between the Community and third countries concerning fisheries.

The *Government of the Kingdom of the Netherlands* maintains that as a consequence of the Irish measures a fundamental principle of the common fisheries policy is at stake and with it the policy itself. It recalls moreover that Dutch fishermen have a direct interest in access to and fishing in the waters to which the Irish measures apply and that those measures cause them considerable damage.

The *Irish Government* emphasizes the fact that fish stocks in the seas around Ireland have been depleted to such an extent that certain stocks are imperilled and can be saved only if adequate measures of control are implemented immediately. The inability of the Member States of the Community to reach agreement not only on permanent measures but even on interim measures made it all the more important that interim measures should be adopted without delay to protect the fishing stocks. Agreement in principle was however reached on a number of objectives which were to form the basis for Community policy in the development and preservation of fishery resources for the future, in particular on the urgent necessity for the restriction of fishing effort in the sea zones referred to in the Irish regulations and on the consideration of the special problems of the Irish fishing industry.

Ireland's right to adopt conservation measures is expressly acknowledged in Council Regulation No 350/77 of 18 February 1977.

Similar restrictions to those involved in the measures in question have already been imposed by Ireland previously and also by the North Sea countries and proposed by the Commission for conservation of fish stocks within the 12 mile limit. They are effective for conserving fish stocks both within and beyond that limit. They are not discriminatory. They are not arbitrary, unreasonable, ineffective or inappropriate. It has not been established that any negotiations between the Community and non-Member States have been or were likely to be prejudiced by these measures.

B — The discriminatory effects of the Irish measures

The *Commission* recalls that Article 2 (1) of Regulation No 101/76 provides that:

— Rules applied by each Member State in respect of fishing in the maritime waters coming under its sovereignty or within its jurisdiction shall not lead to differences in treatment of other Member States.

— Member States shall ensure in particular equal conditions of access to and use of the fishing grounds situated in the waters referred to in the preceding subparagraph for all fishing vessels flying the flag of a Member State and registered in Community territory.

(a) The statement of the Irish Government that this provision does not apply to seas which came under the sovereignty or within the jurisdiction of Ireland subsequent to the date of adoption of the regulation amounts to a contention that it does not apply to the seas within the 200-mile limit claimed by agreement by all Member States with effect from 1 January 1977 but outside the seas over which jurisdiction was exercised by Member States in January 1976.

No argument was suggested and no authority quoted for this surprising contention.

No such contention has ever been made before at any time, by or on behalf of Ireland, or of any other Member State. It is clearly inconsistent with the Hague Resolutions.

The claim is inconsistent with the wording of Article 2 itself of Regulation No 101/76: the first paragraph thereof refers to the rules applied by each Member State 'in the maritime waters coming under its sovereignty or within its jurisdiction'. Paragraph (3) thereof specifies that 'the maritime waters referred to in this article shall be those which are so described by the laws in force in each Member State', without in any way implying that that provision would not apply to the 200-mile zone which was already discussed internationally in January 1976.

The claim is also inconsistent with Articles 3 and 4 of Regulation No 101/76 and with Articles 100 to 103 of the Act of Accession.

It would be irrational if the basic provisions of the regulation laying down a common structural policy for the fishing industry of the Community were to apply only to a small proportion of the seas under Community jurisdiction. It would also be irrational for all the requirements of Regulation No 101/76 to apply only within the traditional narrow waters and for there to be no Community rules at all applicable within the 200-mile zone. The claim of the Irish Government would imply that Article 4 of Regulation No 101/76 gives the Council no power to adopt conservation measures in waters outside the old 12-mile limit.

It is also inconsistent with several regulations of the Council laying down

certain interim measures for the conservation and management of fishery resources applicable to vessels flying the flag of certain non-Member countries. These regulations clearly equate 'the 200 nautical mile fishing zones of the Member States situated off the North Sea and Atlantic coasts and covered by the Community rules on fisheries', with the maritime waters coming under the sovereignty or falling under the jurisdiction of the Member States.

The contention of the Irish Government should be clearly rejected by the Court.

(b) Article 2 (1) of Regulation No 101/76 does not merely prohibit express or open discrimination. A number of tests could be used in order to appraise the actual effects of the Irish measures.

The first test is to establish what proportion of the fishing boats in the various Member States are prohibited from fishing within the zone in question. This information results from the following table:

Member State	Total powered coastal and deep-sea fishing vessels	of which over 33 m registered length and 1 100 b.h.p.	%
Ireland	1 100	2	0.18
France	3 905	160	4
Netherlands	544	94	17.2
United Kingdom	2 520	276	10.6

This table clearly establishes the discriminatory nature of the measures in dispute.

The second test is whether the prohibition which applies in a large area of the open Atlantic, most of it substantially nearer to Ireland than to ports in other Member States, has a different effect with regard to boats based in other Member States.

Since smaller boats are less able in practice regularly to travel long distances in bad weather to fish, or to stay at sea for long periods, it seems clear that the Irish measures have a discriminatory effect, though not a readily quantifiable one.

The third test is the extent to which boats from other Member States which are over the Irish size limits have until now fished regularly in the zone to which the orders relate. This information results from the following table:

Member State	Total fishing vessels normally operating in waters affected by the Irish measures	of which over 33 m registered length and 1 100 b.h.p.	%
Ireland	1 100	1	0.19
France	407	101	24.8
Netherlands	57	57	100
United Kingdom	26	—	—

The discriminatory effect is also obvious in this respect.

(c) It is incorrect to maintain that whatever measures were adopted they would inevitably result in a more severe impact on the fishing industry of some one or more of the Member States than on others.

Depending on the relevant biological facts, a ban on all fishing in certain areas or at certain times, or a ban on all fishing of certain species, or a ban on the use of certain techniques or equipment, or on the use of small net mesh sizes, would normally be non-discriminatory in their effects. So would a fishing plan regime such as that which the Irish authorities were prepared to accept at a certain date. Under Community law the Irish authorities had the duty to adopt the least restrictive and the least discriminatory measures possible to achieve legitimate biological aims. In fact the ban on all fishing in certain areas or at certain times of the year would be easier to enforce with a limited number of fishery patrol vessels than the Irish measures which affect large vessels over a very large sea area.

(d) Both size and power alone, without more, are not directly related either to the total authorized catch or to the total fishing effort and so cannot be objective criteria for conservation measures. The Irish measures involve discrimination in substance: they treat the different situations identically.

(e) Even if a limitation on the size of the boats and the power of the engines had been the only type of effective action open, and even if such a restriction should be regarded objectively as a conservation measure, the limits laid down by the measures in dispute were nevertheless unnecessarily discriminatory in their effects.

(f) The Irish authorities supply no estimates of the reduction in the catches which must result from the measures in dispute, nor have they produced any arguments to show that it was necessary to prevent all fishing by large boats. The only objective achieved by the Irish measures was the exclusion of large foreign boats. Some limitation on the number of large boats might have been permissible if the total fishing effort by small boats had also been regulated.

(g) Ireland could certainly have adopted measures which were even more discriminatory than the measures in question. That fact does not however prove that the measures adopted are not discriminatory in their effects.

(h) There is nothing in the measures in question to suggest that they are interim measures and no public announcement to this effect was ever made. In any case, a discriminatory measure is not made legal by being called an interim measure. Indeed, if the Irish measures were genuine conservation measures they would not be short-term in their nature.

The *Government of the Kingdom of the Netherlands* considers that equal rights for all Community fishermen regarding access to and use of fishing grounds is both an example of the principle of non-discrimination embodied in the EEC Treaty and a basis for the common structural policy for the fishing industry. Article 2 of Council Regulation (EEC) No 101/76 is directly derived from Article 7 of the Treaty. The recitals of the preamble to the regulation state clearly that the Community fishermen must have equal access to and use of fishing grounds in maritime waters coming under the sovereignty or within the jurisdiction of Member States. The case-law of the Court, in particular the judgment of 23 January 1975 in Case 51/74 (*Hulst* v *Produktschap voor Siergewassen*, [1975]

ECR 79) has established that a national measure must also be tested against the provision prohibiting discrimination.

It is necessary to counter the argument of the Irish Government based on the formally objective nature of the measures in question by stating that the essential point is the effect of those measures. Article 2 (1) of Regulation No 101/76 indicates 'shall not lead to' differences in treatment of other Member States. The measures in question must therefore be assessed primarily on their material effect and not simply on their formal presentation.

The assessment of the material effect of the Irish measures made by the Commission is decisive. The data concerning the number of vessels of the other Member States affected by the Irish measures in relation to the total of their vessels operating normally in the waters concerned are particularly valuable.

The *Irish Government* denies that Article 2 (1) of Regulation No 101/76 is applicable in this case and contests that the orders of 16 February 1977 issued by the Minister for Fisheries are discriminatory.

(a) Article 2 of Regulation No 101/76 of 19 January 1976 took effect only in relation to the maritime waters coming under the sovereignty or within the jurisdiction of Member States at the date of the adoption of the said regulation. It does not relate to the maritime waters coming under the sovereignty or within the jurisdiction of Ireland subsequent to that date.

It is necessary to bear in mind with regard to Article 2 (3) of Regulation No 101/76 that the maritime waters to which the Irish measures relate were not 'so described' by the laws in force in Ireland until the making of the Maritime Jurisdiction (Exclusive Fishery Limits) Order 1976 (Statutory Instrument No 320 of 1976) which did not come into operation until 1 January 1977.

Regulation No 101/76 replaced Regulation No 2141/70. It had regard to the changed situation brought about by the accession of the new Member States and recited that in applying the new regulation the derogations provided for in Articles 100 to 103 of the Act of Accession should be taken into account. The overall situation in relation to the maritime waters of the Member States and the control of fishing effort therein changed radically with the adoption of the Hague Resolutions and the extension of the maritime limit of the Member States, of which Ireland was one, to 200 miles. This situation was one which clearly called for amending legislation if it was intended that the restrictions imposed by Regulation No 101/76 and by the earlier Regulation No 2141/70 should be made to apply in the much more extensive sea areas now coming within the jurisdiction of the Member States.

(b) The three statistical tests relied upon by the Commission, for the purpose of establishing that the Irish measures are discriminatory, are arbitrary and have no legal basis.

(c) The Commission has not shown that the Irish measures are inconsistent with the provisions of Article 2 of Regulation No 101/76. Article 7 of the Treaty prohibits 'any discrimination on the grounds of nationality' and even this prohibition is qualified by the proviso that it is to be confined 'within the scope of application of the Treaty' and is to be 'without prejudice to the special provisions contained therein'. The Irish measures do not discriminate on the grounds of nationality and should not be regarded as discriminatory merely because their impact on the fishing activities of some Member States is greater than on those of others, including Ireland.

Ireland is empowered under Community law to adopt conservation measures relating to the maritime waters coming under its control. Whatever the measures adopted they would inevitably have a more serious effect on the fishing industry of one or of several Member States than on others. The measures which have been criticized were made applicable without distinction to all the Member States and therefore do not, according to the case-law of the Court, constitute discrimination prohibited by Community law. Their application does not make any distinction or differentiation between the ships of the various Member States and the conditions of access to and use of the Irish fishing grounds are the same for fishing vessels for all the Member States.

(d) It is true in fact that in excluding vessels which exceeded certain limits of size and brake horse-power from the maritime areas referred to the impact of the Irish measures on Member States having fishing fleets consisting to a substantial degree of large vessels is much more severe than in the case of Ireland itself where virtually the entire fishing fleet falls within the prescribed limits. Nor does Ireland dispute the fact that these conservation measures, as any other conservation measures, were destined to cause substantial reduction of fishing catches in Irish waters in the short term to the fishing fleets from those countries most seriously affected by the measures. None of these considerations however has the effect of making the Irish measures discriminatory in the prohibited sense or invalid for any onther reason.

(e) It follows from the case-law of the Court that the consequences of domestic law may legitimately be more severe in their impact on one or more Member States than on others, when all relevant considerations have been taken into account. In the present case consideration must be given to all the relevant factors in the case, including the need for special support in the case of the Irish fishing industry which has been recognized in successive documents emanating from the Commission itself. Special measures of support in such a situation should not be regarded as discrimination in favour of one Member State as against all others, but as a recognition of the special needs of one Member State if it is to be brought eventually onto an equal footing with its other partners in the development of a particular industry.

(f) Conservation measures were demanded as a matter of urgent necessity. In default of Community measures for the purpose it was imperative that Ireland take unilateral measures to conserve the fishing stocks in the maritime waters under its jurisdiction. The measures adopted were adopted to achieve this object as interim measures only and were appropriate for this purpose. It has not been demonstrated that any other measures could have been adopted by Ireland on a unilateral basis which could have been effectively implemented during the same period and which would have achieved the same objective of conservation of fish stocks while avoiding any criticism based on alleged inequality of treatment.

(g) Recourse to a total ban on fishing would have been much more drastic than the measures in question in its impact on the fishing industry as a whole. It would have gone further than was reasonably necessary for the purposes of conservation.

(h) It has not been shown that the measures were in any way disproportionate to the legitimate objectives sought to be attained.

(i) The gross registered tonnage of the entire Irish fishing fleet is minute by comparison with the fishing fleets of other Member States. So also is Ireland's share of the fishing catch in the maritime waters referred to in the Irish measures, and her gross fishing catch, by comparison with that of other Member States. The Irish fishing fleet, fishing to its maximum capacity, presents no threat whatever to the fish stocks in the seas where it operates.

At the same time the industry is of major importance for Ireland in the numbers employed and in the yield for the Irish economy.

It is against this background that the Irish measures must be assessed, and the challenge based on alleged discrimination must be viewed in the light of the accepted need for urgent conservation measures and for indispensable measures of support to be taken to bring about the development of the Irish fishing industry.

C — The question whether the measures in dispute are conservation measures

The *Commission* does not contest that the Irish measures would, because of their discriminatory effects, tend to reduce the catches in the zone to which they apply. Nevertheless, they should not be regarded objectively as conservation measures in the true sense of the term.

(a) Introducing conservation measures consists in ensuring rational use of a renewable natural resource, in other words exploitation on an optimum basis. This means regulating the fish mortality of each species due to fishing activities by regulating the numbers of fish caught and controlling fishing activities or methods likely to interfere with reproduction or feeding or to injure the marine ecosystem. This involves or may involve regulating the number of boats fishing, the areas where they may fish, the amount of time spent fishing, the size of nets and type of equipment used, and the size of fish which may be caught. The purpose of all this is to keep the total catch within the maximum permissible limits, the 'total allowable catch' being allocated, by quotas or other arangements, between interested parties, and to ensure proper reproduction or replenishment of the stocks.

A genuine policy for the conservation of maritime resources could only consist in a combination of several different measures, in particular restrictions on the catch of certain species, fishing areas, periods, methods and tackle. The criterion of 'boat size' cannot be used in isolation. It must necessarily be integrated into a general restriction on the fishing effort.

(b) A measure which gives local coastal fishermen using small fishing boats preferential rights to fish in a given area may be justified in the light of Community fisheries policy, depending on the circumstances, but it is not a measure primarily or exclusively for the conservation of the local fish stocks. Allocating the fishing in a given area to specified boats or types of boats is not in itself a conservation measure.

The Irish measures prohibit all fishing by large fishing boats, for any species, even the species not in need of conservation, over a very large area of sea which does not correspond to any fish stocks, throughout the year, for an unlimited period, irrespective of techniques or equipment. They do nothing to limit the total number of fish caught; or the total number of boats authorized to fish; or the total time spent fishing: or the mesh size, equipment or techniques used. They do not limit either the total catch or the total fishing effort in the areas to which they relate. They merely prevent large boats from taking part in that fishing

effort. Nor do they prevent fishing in spawning grounds or nurseries, nor do they protect vulnerable areas from fishing by harmful methods.

(c) The reference by the Irish Government to Regulations Nos 194/77 and 746/77 are irrelevant. They provide, with regard to the boats of the third countries concerned, size limits totally different from those in the Irish measures and there is no reason to say that they are primarily or exclusively a conservation measure. Regulation No 194/77 excludes only factory ships, whereas the Irish measures totally prohibit all fishing by large boats, for any species.

(d) Certain recommendations of the North-East Atlantic Fisheries Commission and the Commission's proposals of 20 December 1976 and 14 January 1977 also, it is true, included limitations on boat size. However, they were intended only to protect certain limited areas where there are particularly vulnerable ecosystems. It would be unnecessary and entirely inappropriate to adopt such limitations for a vast area of open ocean. A measure which results in reduced catches in one area of the Community waters is not necessarily a sound conservation measure, from the Community point of view. It might for example cause increased fishing pressure on other areas of Community seas. This in turn might prompt unilateral measures by other Member States. Any rational scientifically-based Community conservation policy could deal only with the entire area under the jurisdiction of the Community.

(e) It is not disputed that a large and powerful fishing boat is able to catch more fish than a smaller less powerful boat, all other things being equal, or that a genuine conservation measure might properly limit the number of boats fishing in a given area. But none of this justifies in any way a total ban on fishing by large boats, while no restrictions are imposed on smaller boats, on how many there are, on where and when they fish or for what species, or with what equipment or techniques.

(f) A Community regulation may properly promote social, economic and regional policy objectives. National conservation measures by definition are not concerned with such objectives or they run the risk of ceasing to be conservation measures, of being discriminatory or of going too far, just as the Irish measures have done. Simple limitations on boat size or other provisions giving preferential rights for local inshore fishermen, which might be legal in Community regulations adopted by the Council in accordance with the Treaty, are not necessarily legal when adopted as national measures under powers which allow only limited, non-discriminatory conservation measures to be adopted by Member States.

(g) The Irish legislation adopted in 1952, 1959 and 1960 was adopted before Ireland joined the Community and should not necessarily be regarded as a conservation measure, but rather as an economic and social policy measure. It applied only within limits much narrower than those laid down in the measures in question.

(h) The Irish measures relate only to a zone defined by reference to lines of latitude and longitude which, in themselves, are without biological or ecological significance. The zone in question is very large, and is considerably larger than the 50 mile wide exclusive coastal ban demanded by the Irish Government.

(i) It is clear that the Irish measures go further than is reasonable, necessary or appropriate to protect the stocks of those species of fish which the Irish

Government may be legitimately concerned to conserve and protect from over-fishing. Member States are obliged by Community law to limit any national measures which they may take for fish conservation or other legitimate purposes to the minimum necessary to achieve the objectives sought, so as to interfere as little as possible with the operation of the Community policy. The Irish measures are arbitrary and far-reaching, both geographically and in their effects on the operation of the Community. They prevent a large number of fishing boats registered in the Community from fishing for any species of fish, even those not in need of conservation, in a very large sea area throughout the year, and for an unlimited period.

(j) The Irish measures cannot be regarded objectively as conservation measures and they are therefore not consistent with the system established by Regulations Nos 100/76 and 101/76, even if they were compatible with Article 2 of Regulation No 101/76.

The *Government of the Kingdom of the Netherlands* is also of the opinion that the Irish measures may not reasonably be regarded as suitable and necessary for the conservation of fish stocks, if only because the restrictions are not in any way particularized. The listing of species, areas, fishing seasons, methods of fishing and fishing gear is mentioned in Article 4 of Regulation 101/76 and is anyway customary in conservation measures adopted by international organizations concerned with fisheries.

If the Irish measures remain in force, they will cause a trend towards smaller vessels with less powerful engines. They would then lose much of their conservation effect. Such a trend would, moreover, hinder the rational development of the fishing industry, mentioned as an aim in Regulation No 101/76.

The *Irish Government* considers that the complaint that the orders which have been criticized are not genuine conservation measures is unfounded.

(a) It is not in dispute that the critical situation which has arisen with regard to fish stocks has coincided with the advent of large and powerful fishing vessels in the post-war period. The capacity of these vessels to remain for long periods in the fishing grounds, their superior engine power, which enables them to pursue shoals and maintain contact with them, and their ability to use larger and heavier fishing gear are all factors enabling them to make disproportionately greater inroads on fish stocks than smaller and less powerful vessels. The importance of excluding these larger fishing vessels from fishing grounds where urgent measures of conservation are needed cannot seriously be contested.

(b) That importance was recognized by the Commission itself in its proposals for regulations submitted to the Council in December 1976 and January 1977. In this respect it is impossible to accept that a measure which is a valid and effective conservation measures within a 12-mile limit ceases to be so beyond that limit.

(c) In Joined Cases 3, 4 and 6/76 *(Kramer)*, the Court had to consider restrictions or prohibitions on fishing recommended by the North-East Atlantic Fisheries Commission with regard to vessels of more than 50 metric tons with an engine rating exceeding 300 horse-power.

(d) Moreover, Council Regulation No 194/77 of 28 January 1977 laying down certain interim measures for the conservation and management of fisheries resources applicable to Polish, East German and Russian vessels (OJ L 25, p. 46) made fishing by vessels from these countries conditional upon the

issue of a licence and determined the number of licences on the basis of the gross registered tonnage of the fishing vessels of those States. Similar provisions were laid down in Council Regulation No 746/77 of 5 April 1977 laying down interim measures for Spain, Finland and Portugal (OJ L 90, p. 8). The Council thus recognized the necessity, in the interests of conservation of fishing stocks, of restricting drastically the incursions of large fishing vessels into the named sea zones.

(e) The imposition of similar restrictions to those which are the subject-matter of the orders in question is not a new development in Irish law. This is shown by the Acts of 1952, 1959, 1960 and 1976.

(f) The argument that the measures in question are arbitrary and unreasonable by reference to the sea areas over which they take effect cannot be accepted. The areas indicated relate to sub-zones recognized by the Community. They have regard to maritime waters of other Member States and facilitate both the enforcement and observance of the orders.

(g) Ireland does not describe the entire sea areas referred to in the Irish measures as a particularly vulnerable ecosystem or a single spawning ground, nor is it necessary for her to do so in order to justify the measures which have been taken in the interests of conservation. Ireland does not accept the logic of applying conservation measures only to areas recognized as spawning grounds.

(h) Ireland was entitled to have regard to the general Community policy in relation to fisheries and to opt for measures which would permit the Irish fishing industry to continue to endeavour to meet the target of increased annual catches. By reason of the minimal share taken by Irish fishermen of the total annual catches in the sea areas referred to in the Irish regulations, this policy can be pursued quite consistently with the overall policy of conserving fish stocks and saving them from depletion.

(i) The Irish measures are essentially interim and short-term in their nature, having regard in particular to the obligation imposed upon the institutions of the Community to adopt permanent measures of conservation in the near future. As such, they are appropriate to bring about a general and significant limitation of fishing effort in the sea areas concerned, in the intervening period.

D — The effect of the Irish measures on external negotiations

The *Commission* recalls that the judgment of the Court of 14 July 1976 in the *Kramer* case lays down two principles. On the one hand, the Member States are under a duty not to enter into commitments which could hinder the Community in carrying out the tasks entrusted to it by Article 102 of the Act of Accession and, on the other, they are under a duty to proceed by common action within the context of international fisheries negotiations. The Irish measures have such extensive effects that they violate these two duties, since they seriously interfere with the negotiations of the Community, which has authority to enter into international commitments for the conservation of the resources of the sea, with third countries.

(a) The Irish Government and the other Member States agreed in the European Council at The Hague of 30 October 1976 to authorize the Commission to negotiate fisheries arrangements with non-Member States. A power once jointly conferred cannot be unilaterally withdrawn in whole or in a substantial part.

(b) At the time of the adoption of the negotiating mandate to the Commission, the Council was aware that the internal regime had not been entirely established and that this would be brought about concurrently with the external regime. The Council therefore accepted the disadvantages which might result, during the negotiations with third countries, from the existence of certain national conservation measures, nevertheless only in so far as they constituted real conservation measures limited to the minimum necessary. Unilateral national measures affecting a large number of boats over a large sea area, in particular when adopted by a Member State having sovereignty or jurisdiction over a large proportion of Community seas, call in question the credibility of the Community in negotiations with non-Member States. The Community cannot negotiate satisfactorily if rights which it proposes to grant, on an appropriate basis, to boats of a non-Member State are withdrawn or drastically reduced by unilateral action while negotiations are continuing.

(c) If the Irish measures are considered as compatible with Community law other Member States would also be free to adopt unilaterally similar measures. Such national measures might extend to the entire sea area under national sovereignty or jurisdiction. It would clearly be impossible for the Community to conduct serious negotiations with non-Member countries if each maritime Member State adopted or was likely to adopt or was known to be free to adopt at any time measures of the kind adopted by the Irish Government. In its negotiations with non-Member countries the Community has always reserved the right to regulate its internal regime in accordance with its own needs but this does not permit individual Member States acting unilaterally without the agreement of the Commission to adopt measures with effects as important and as serious as the Irish measures.

(d) The fact that the Community has not exercised all its power with regard either to the internal regime of catch quotas or its external relations in the field of fisheries does not mean that the Member States are free to exercise their national legislative powers in that area without regard to the consequences, for the Community's negotiating position, of their actions.

(e) Member States must refrain from unilaterally adopting national measures inconsistent with agreements already made by the Community with non-Member States. They are also under a duty to prevent the Community from being faced with the difficult, if not impossible, task of negotiating the terms of a further agreement with a non-Member State and for this purpose, defining clearly to what extent that agreement modified each national measure. Bearing in mind that the arrangements made with non-Member States inevitably differ from one another, the complexity of the arrangements which would result, assuming that they could be successfully made at all, would be intolerable. The complexity of the external negotiations with each non-Member State would be multiplied by the number of Member States which had adopted national measures.

(f) In particular, the Commission cannot conduct negotiations in the light of national measures, such as the Irish measures, which have not been discussed with it, which are not conservation measures, which do not need to be adopted, which the Commission has not anticipated or proposed and which are not appropriate to the only conservation problems of which it or the national authorities are aware.

(g) The Irish measures exerted an adverse influence in particular on the negotiations with the USSR, which contested the effectiveness of the control by the Community of the Community fisheries, with Canada and the USA, which questioned the Community's power to enter into international agreements on fisheries or to ensure that they are carried out, with Norway, which claimed that the balance of the arrangements agreed between the Community had been upset in order to request renegotiation of them, and with certain other non-Member States which threatened to take retaliatory measures.

(h) The Irish measures are so disruptive of the proper functioning of the common fisheries policy that they should be regarded as contrary to Community law. This argument is confirmed by the considerations explained by the Court in its Opinion of 26 April 1977 on the draft Agreement establishing a European laying-up fund for inland waterway vessels (Opinion 1/76, [1977] ECR 741).

The *Irish Government* is of the opinion that the Commission gives no valid example of the serious damage which the measures which have been criticized are said to have caused to negotiations with non-Member States.

(a) Any such negotiations must inevitably be conducted with due regard for conservation measures, whether interim or permanent, which require to be taken to preserve fish stocks in Community waters and those of the third countries concerned.

(b) What are under negotiation at present are framework agreements with non-Member States which do not contain any provisions as to quotas and fishing areas and cannot be affected by short-term conservation measures since in any case they are subject to the outcome of negotiations for a permanent internal regime.

A number of such agreements have in fact been concluded and it is difficult to see how substantive provisions relating to quotas and fishing areas can be added to these agreements or to agreements at present under negotiation until the internal regime has been established.

(c) None of the dangers referred to by the Commission with regard to the negotiations being conducted with the USSR, the United States and Canada has arisen.

With regard to the other non-Member countries, no actual threat of retaliation against Community vessels has up to now materialized.

The exclusion of three Norwegian fishing boats from the zone covered by the Irish measures was attributable to an erroneous application of the measures in question.

(d) The reference to the judgment of the Court in the *Kramer case* cannot be accepted. That case was primarily concerned with the situation where a Member State enters into international commitments independent of those negotiated in respect of the Community.

(e) The fears expressed by the Commission about negotiations with third countries are either illusory, or else emanate from the general problems of negotiating a satisfactory external policy before an adequate internal regime has been agreed by the Member States.

E — The effect of the Irish measures on the common fisheries policy

The *Government of the Kingdom of the Netherlands* takes the view that it follows from the principle of equal access to and use of fishing grounds that the maintenance of fish stocks is a Community responsibility, as is emphasized by certain of the recitals of

the preamble to Regulation No 101/76. With regard to that need to safeguard fish stocks, the conditions for fishing must therefore be determined at Community level, as Regulation No 101/76 envisages for the future and as Article 102 of the Act of Accession expressly prescribes.

Unilateral protective measures may make it much harder and perhaps even impossible to achieve a common policy. This finding applies not only to the Community's external fisheries policy but also to the development of the internal policy. Under Article 5 of the EEC Treaty the Member States must refrain from taking any measures which might jeopardize the achievement of the Treaty's aims. This provision is much more pertinent under today's circumstances.

It would be quite incorrect to conclude from the judgment in the *Kramer* case that measures such as those now at issue are in principle permissible. It is necessary to take into account the temporary nature of the catch restrictions at issue in this case, of the state of Community legislation at that time, and particularly of the time-limit set in Article 102 of the Act of Accession. It is necessary to distinguish between a time in the past when the Community had not yet begun to create a policy on conservation, the present when one is being created and the future when the Council must by then have adopted, within a certain period, measures for the conservation of the resources of the sea.

The *Irish Government* stresses the interim and temporary nature of the orders in question which cannot affect the establishment of a common policy.

(a) Articles 102 and 103 of the Act of Accession impose an obligation on the institutions of the Community to promulgate conservation measures within a limited period following upon the accession of the new Member States. Until such measures are adopted the interests of the Community as a whole demand that a free-for-all situation should not be allowed to prevail in the maritime waters to which the Irish measures relate. The Hague Resolutions recognize the right and duty of individual Member States to take effective action in the interest of conservation of fish stocks pending the implementation of Community measures having the same object. The interim and temporary nature of the Irish measures was clearly indicated by Irish Ministers in Council on more than one occasion.

(b) Unilateral protective measures are not calculated to make it more difficult or impossible to reach agreement on Community measures.

Unilateral measures were adopted by the United Kingdom in relation to the North Sea and were followed in due course by Community measures dealing with the same sea areas and fishing activities.

Internal negotiations on Community proposals had proved fruitless over a period of many months before the Irish interim measures were adopted. Ireland had indicated her general agreement with interim proposals involving fishing plans which were put forward by the Commission and only implemented her unilateral measures when no consensus could be reached among Member States on joint action.

F — The damage caused to the interests of the Netherlands fishing industry

The *Government of the Kingdom of the Netherlands* observes that the Netherlands trawler fleet comprises 42 vessels. All of them very dependent on the exploitation of the fishing grounds adjacent to the Irish coast. Catches in that area during the summer are traditionally of crucial importance for the yearly average yield and therefore

for the continued existence of the Netherlands trawler fleet. However, 35 of the 42 trawlers do not meet the requirements set out in the Irish orders. They therefore have implications not only for the employment of around 650 men but also for the existence of the fish-processing factories with far wider consequences for employment.

The *Irish Government* maintains that the Netherlands fishing fleet did not resort traditionally to the seas to the west and south of Ireland and that the appearance of Netherlands vessels in any significant numbers goes back no more than a few years. The concentration of fishing effort in these waters by the Netherlands and other States is attributable to a very large extent to a diversion of fishing effort away from waters that have already been denuded of fish stocks to those areas less seriously affected.

It is necessary, however, to take into consideration the fact that if the Netherlands fishing industry were one of the principal sufferers by the impact of the conservation measures in the short term taken by the Irish Government it would also be one be one of the principal beneficiaries in the long term.

V — Oral procedure

At the hearing on 14 December 1977 the Commission of the European Communities, represented by its Agent, John Temple Lang, the Kingdom of the Netherlands, represented by its Agent, G. W. Geesteranus, and Ireland, represented by R. J. O'Hanlon, S.C., submitted oral argument and their replies to the questions raised by the Court.

The Advocate General delivered his opinion at the hearing on 19 January 1978.

Decision

1 By application of 13 May 1977, the Commission has brought an action under Article 169 of the EEC Treaty for a declaration that, in applying certain restrictive measures in the seas fisheries sector, Ireland has failed to fulfil its obligations under the Treaty.

Background to the dispute, connexion with Case 88/77 and the interim measures

2 The parties are not in dispute regarding the underlying facts of the case.

3 The first of these is that, at its meeting in The Hague on 30 October 1976, the Council adopted a resolution (hereinafter called 'The Hague Resolution'). Which was formally approved on 3 November 1976, whereby it was agreed that, with effect from 1 January 1977, the Member States

would, by concerted action, extend the limits of their fishing zones to 200 miles off their North Sea and North Atlantic coasts.

4 In that resolution, the Council laid down that, as from the same date, the exploitation by the fishing vessels of third countries of fishery resources situated in these zones would be governed by agreements between the Community and the third countries concerned and at the same time decided on the principle of concerted action by the Member States for the purpose of future proceedings of the competent international fisheries bodies.

5 Furthermore, the Council (in Annex VI to the resolution) referred to certain aspects of the Community's internal fisheries system and, more particularly, noted the need to evolve common measures for the conservation of resources without prejudice to the possibility that the Member States could, in conjunction with the Commission, adopt the appropriate interim measures pending the entry into force of common regulations.

6 Within the framework of the same resolution the Council declared its intention so to apply the provisions of the Common Fisheries Policy as to secure the continued and progressive development of the Irish fishing industry.

7 Subsequently, the Council gave fresh consideration to the establishment of a Community system for the conservation and management of fishery resources on the basis of a proposal for a regulation submitted by the Commission on 8 October 1976 (OJ C 255, p. 3).

8 On 3 December 1976 the Commission, in view of the difficulties which had arisen, submitted a proposal concerned only with the introduction of interim measures which, subsequently, it repeatedly amended in accordance with the differences of opinion which arose within the Council.

9 It is to be noted that the Irish Government took an active part in the work of the Council on this question and, on 13 December 1976, submitted additional proposals to supplement the conservation measures put forward.

10 These proposals contained a number of provisions, including one for the exclusion of factory ships, the creation of special conservation zones for

certain stocks, the prohibition of certain methods of fishing and the exclusion of fishing boats of over 85 feet or 1 000 horse-power from an area extending 20 miles from the coast.

11 At this stage of the proceedings, the Irish delegation repeatedly drew the Council's attention to the urgent need to take conservation measures and made it clear that, in the absence of early agreement, Ireland would find itself compelled to act unilaterally.

12 As this warning was repeated with some force during the meeting of the Council on 8 and 9 February 1977 (which, too, proved fruitless) the Commission, in a message dated 11 February 1977, drew the attention of the Irish Government to the fact that The Hague Resolution provides that before adopting conservation measures a Member State must have consulted and sought the approval of the Commission, adding that discussions in the Council are no substitute for that procedure.

13 In a letter dated 14 February 1977, the Minister for Foreign Affairs of Ireland, after referring to the proposals submitted by his country on 13 December 1976, informed the Commission that 'the Government has reluctantly decided that it can no longer delay on this matter and that it must now take the necessary unilateral conservation action of an interim kind' and, after giving a brief indication of the substance of the measures adopted, stated that the orders giving effect to them would be made by the Minister for Fisheries on the following day, 15 February.

14 It was in fact on 16 February that the Irish Minister for Fisheries made two orders the first of which, entitled 'Sea Fisheries (Conservation and Rational Exploitation) Order 1977' was designed to prohibit the entry of sea fishing boats and fishing in a maritime area situated within that portion of the exclusive fishery limits of Ireland which lies south of the parallel of 56° 30′ North latitude, east of the meridian of 12° West longitude and north of the parallel of 50° 30′ North latitude. The second order entitled 'Sea Fisheries (Conservation and Rational Exploitation) (No 2) Order 1977' exempts from that prohibition sea fishing boats not exceeding 33 metres in registered length or having an engine power not exceeding 1 100 brake horse-power. (These orders are hereinafter referred to as 'the Irish measures'.)

15 After a meeting had been held as a matter of urgency between the representatives of the Governments of Ireland and the other Member States

concerned the Commission, by letter of 22 February 1977, firmly expressed disapproval of the Irish measures and asked the Government to postpone the date of their application pending the outcome of the forthcoming discussions in the Council which, at that time, had every appearance of reaching an early conclusion.

16 At the meeting on 25 March 1977 it was clear that there was in fact a large measure of agreement amongst the members of the Council, including Ireland, on the latest proposals of the Commission but a decision could not be taken on that occasion because of the opposition expressed by one of the Member States.

17 Faced with this setback, the Irish Government, by letter of 4 April 1977, informed the Commission that the orders of 16 February 1977 would be made effective from 10 April 1977.

18 Following this unilateral action by Ireland the Commission initiated the preliminary procedure in Article 169 of the EEC Treaty which led to the matter coming before the Court of Justice.

Connexion with Case 88/77

19 By order of 7 July 1977, in relation to a prosecution brought against the Masters of certain Netherlands trawlers who were charged with having contravened the prohibitions arising under the orders of 16 February 1977, the District Court for the District Court Area of Cork City (Ireland) referred certain questions to the Court of Justice under Article 177 of the EEC Treaty for a preliminary ruling which would enable it to assess the compatibility of those measures with Community law.

20 In connexion with that case, which was entered at the Court of Justice under No 88/77, observations were submitted by the parties to the main action, by the Governments of the French Republic and of the Kingdom of the Netherlands and by the Commission.

21 Although the questions considered in that case are substantially the same as the legal issues raised in the present proceedings, the defendants in the main action in the prosecution before the Cork District Court and the French Government have, however, advanced certain special arguments which

clearly ought to be taken into account in the present case in order that all aspects of the dispute may be fully examined.

22 As all the parties to the present proceedings were also involved in Case 88/77, this course respects the rights of the parties.

Interim measures

23 Finally it should be noted that, in lodging its application under Article 169 of the EEC Treaty, the Commission requested the Court, under Article 186 of the Treaty and Article 83 of the Rules of Procedure, to prescribe interim measures and to order the Irish Government to suspend the measures in dispute until the Court of Justice delivered its final judgment.

24 The Court granted this request by successive orders of 22 May, 21 June and 13 July 1977 ([1977] ECR 937 and 1411) the last of which ordered Ireland to suspend the contested measures by 18 July 1977 at the latest.

25 The Irish Government has announced that it has refrained from implementing the contested measures as from the date set in the order of the Court after giving the necessary instructions to the competent authorities and that nothing more needed to be done because the order 'has had the force of law in Ireland' as from the date laid down therein for it to come into effect 'and consequently has had the effect of suspending, in accordance with its terms, the two Sea Fisheries Orders as from that time'.

26 According to the explanations given, this follows from the provisions of the Irish Constitution and from the European Communities Act 1972, which gives the law of the Communities (including the judgments and orders of the Court of Justice) precedence over domestic Irish law.

27 The Commission, to which this statement was in turn communicated, raised no objection to it.

The law to be applied

28 In common with all other economic activities, fisheries come under the EEC Treaty and, more particularly, are treated as agriculture under the terms of

Article 38 of the Treaty and, under that article, are thus covered by the provision of a common policy.

29 The first rules on fishing questions were laid down in two regulations of the Council namely Regulation (EEC) No 2141/70 of 20 October 1970 laying down a common structural policy for the fishing industry, on the basis of Articles 7, 42, 43 and 235 of the EEC Treaty (OJ, English Special Edition 1970 (III), p. 703), and in Regulation (EEC) No 2142/70 of the same date on the common organization of the market in fishery products, based on Articles 42 and 43 *(ibid.,* p. 707).

30 Articles 98 to 103 of the Act of Accession made certain additions to the system thus defined and these articles together formed Chapter 3 of Title II relating to agriculture.

31 Of these provisions special attention must be paid to Article 102, which reads: 'From the sixth year after accession at the latest, the Council, acting on a proposal from the Commission, shall determine conditions for fishing with a view to ensuring protection of the fishing grounds and conservation of the biological resources of the sea'.

32 Following the enlargement of the Community the provisions relating to fisheries were repeated in two regulations of the Council, promulgated on the same basis as the previous regulations, in addition to the Act of Accession, namely No 100/76 of 19 January 1976 on the common organization of the market in fishery products (OJ L 20, p. 1) and Regulation (EEC) No 101/76 of the same date laying down a common structural policy for the fishing industry *(ibid.,* p., 19).

33 Article 1 of the latter regulation reads:

'Common rules shall be laid down for fishing in maritime waters and specific measures shall be adopted for appropriate action and the co-ordination of structural policies of Member States for the fishing industry to promote harmonious and balanced development of this industry within the general economy and to encourage the rational use of the biological resources of the sea and of inland waters'.

34 Article 2 (1) reads:

'Rules applied by each Member State in respect of fishing in the maritime waters coming under its sovereignty or within its jurisdiction shall not lead to differences in treatment of other Member States.

'Member States shall ensure in particular equal conditions of access to and use of the fishing grounds situated in the waters referred to in the preceding subparagraph for all fishing vessels flying the flag of a Member State and registered in Community territory'.

35 Finally Article 4 of the regulation provides as follows:

'Where there is a risk of over-fishing of certain stocks in the maritime waters referred to in Article 2, of one or other Member State, the Council, acting in accordance with the procedure provided for in Article 43 (2) of the Treaty on a proposal from the Commission may adopt the necessary conservation measures.

In particular, these measures may include restrictions relating to the catching of certain species, to areas, to fishing seasons, to methods of fishing and to fishing gear'.

36 The special problem of the conservation of resources was, at the suggestion of the Commission, mentioned in The Hague Resolution, referred to above, which was adopted for the purpose of the concerted extension of the fishing zones to 200 miles off the North Sea and North Atlantic coasts.

37 Annex VI to the resolution reveals that on that occasion the Council agreed on a statement by the Commission worded as follows:

'Pending the implementation of the Community measures at present in preparation relating to the conservation of resources, the Member States will not take any unilateral measures in respect of the conservation of resources.

However, if no agreement is reached for 1977 within the international fisheries Commissions and if subsequently no autonomous Community measures could be adopted immediately, the Member States could then adopt, as an interim measure and in a form which avoids discrimination, appropriate measures to ensure the protection of resources situated in the fishing zones off their coasts.

Before adopting such measures, the Member State concerned will seek the approval of the Commission, which must be consulted at all stages of the procedures.

'Any such measures shall not prejudice the guidelines to be adopted for the implementation of the Community provisions on the conservation of resources'.

38 The Irish Government has raised an objection concerning the geographical area of application of Regulation (EEC) No 101/76.

39 The Irish Government refers to the provision in Article 2 (3) of Regulation (EEC) No 101/76, which reads: 'The maritime waters referred to in this article shall be those which are so described by the laws in force in each Member State', and contends that the regulation in question took effect only in relation to Irish maritime waters as they were defined at the time of entry into force of the regulation, prior to the extension of the fishing zones on 1 January 1977.

40 This would mean that the provisions of the regulation are not applicable to the maritime waters covered by the contested measures and that only an appropriate amendment of Regulation (EEC) No 101/76 can extend the regulation to cover the maritime waters involved.

41 The Commission describes this contention as 'surprising' and considers it to be inconsistent with the interpretation which must be placed on the wording both of Articles 100 to 103 of the Act of Accession and on the provisions of Regulation (EEC) No 101/76 and as inconsistent with the attitude adopted by the Irish Government at the time of the drafting in the Council of The Hague Resolution and of a number of regulations on the subject.

42 The Commission again calls attention to the fact that the effect of the interpretation placed by the Irish Government on the reference contained in Article 2 (3) of Regulation (EEC) No 101/76 would be to restrict the field of application of the common structural policy for the fishing industry to a small proportion of the seas under the jurisdiction of the Member States and thus prevent the Council from introducing conservation measures applicable outside the old 12-mile limit.

43 The Government of the Kingdom of the Netherlands claims, on this point, that the geographical area of application of the rules of Community law is

defined by the total area of the European territories of the Member States and that, accordingly, any alteration which a Member State makes in the extent of its jurisdiction also represents an alteration of the limits of the Common Market.

44 This was the underlying conception in Article 2 (3) of Regulation (EEC) No 101/76, which applies to maritime waters coming within the jurisdiction of a Member State under its laws, regardless of their date of entry into force.

45 In order to determine the geographical area to which Regulation (EEC) No 101/76 applies, its provisions must be interpreted in the light of the legal context in which, both as regards its subject-matter and its purpose, the regulation appeared.

46 As institutional acts adopted on the basis of the Treaty, the regulations apply in principle to the same geographical area as the Treaty itself.

47 Article 2 (3) of Regulation (EEC) No 101/76 must therefore be understood as referring to the limits of the field of application of Community law in its entirety, as that field may at any given time be constituted.

48 Consequently, the reference in that provision to the 'laws in force' in the various Member States as describing the maritime waters coming under their sovereignty or within their jurisdiction must be interpreted as referring to the laws applicable from time to time during the period of validity of the regulation concerned.

49 This interpretation is the only one which accords with the subject matter and purpose of the regulation, which is to establish a common system for fishing throughout the whole of the maritime waters belonging to the Member States.

50 It follows that any extension of the maritime zones in question automatically means precisely the same extension of the area to which the regulation applies.

51 In consequence, the interpretation placed on Article 2 (3) of Regulation (EEC) No 101/76 by the Irish Government must be rejected.

Substance

52 It is accepted by all the parties in the two cases that, at the time of the measures which are the subject of the dispute, the introduction of conservation measures for the fishery resources was essential and indeed urgent in the waters coming within the jurisdiction of Ireland.

53 Nor is it in dispute that there was a continued need therefor despite an appreciable reduction in the catches of certain third States in the maritime area concerned as the result of the extension of the fishing zone on 1 January 1977 and of the provisions adopted by the Community.

54 In consequence the dispute resolves itself into four groups of arguments, submitted with varying emphasis by the parties appearing in the proceedings in each of the two cases, and these arguments relate to

— the jurisdiction of Ireland;

— the action taken in this instance by the Irish Government;

— the question whether the Irish measures can be regarded as genuine conservation measures; and

— the question whether, in introducing these measures, Ireland contravened the non-discrimination rule enshrined in Article 7 of the Treaty and in Regulation (EEC) No 101/76.

55 Consideration must first be given to the question of jurisdiction, which has a bearing on all the other submissions, including the possibility of a breach of the non-discrimination rule.

Jurisdiction of the Irish State

56 The defendants in the main action in Case 88/77 contend that the Irish State has no authority to adopt conservation measures on a national basis since, in their view, those measures now come within the jurisdiction assumed by the Community.

57 In support of this contention they refer in particular to Article 102 of the Act of Accession, under which the power is reserved to the Community institutions to determine conditions for fishing with a view to ensuring protection of the fishing grounds and conservation of the biological resources of the sea; the Regulations (EEC) Nos 100/76 and 101/76 on the

subject of the common organization of the market in fishery products and the common structural policy for the fishing industry; and The Hague Resolution, in that it provides for the extension of the fishing zones 'by concerted action'.

58 The judgment of the Court of 14 July 1976 in Cases 3, 4 and 6/76, *Kramer and Others* [1976] ECR 1279 does not dispose of the argument which they put forward since it recognized the jurisdiction of Member States in the matter only by virtue of international commitments previously undertaken.

59 The French Government, in the statement lodged in Case 88/77, emphasizes the fact that the fishing policy is a Community one, as is made clear both in Article 38 (1) of the EEC Treaty and by the successive regulations and the fact that this is confirmed as the position in law, particularly as regards the conservation measures, by Article 102 of the Act of Accession and The Hague Resolution.

60 This standpoint also has the authority of the Court's decision in the *Kramer* case.

61 The power to establish permanent rules for fishing belongs therefore to the Community as such and, according to the settled case-law of the Court, as expressed in particular in paragraph 31 of the decision in the judgment of 31 March 1971 in Case 22/70, *Commission* v *Council* [1971] ECR 263, this power is an exclusive one.

62 The conclusion which the French Government draws from these considerations is that all unilateral measures of the Member States in that sector offend against Community law once the Community has assumed its full powers of the transitional period provided for by Article 102 of the Act of Accession has expired.

63 As the Court had already held in the *Kramer* judgment of 14 July 1976, the Community has the power to take conservation measures both independently and in the form of contractual commitments with non-Member States or under the auspices of international organizations.

64 In so far as this power has been exercised by the Community, the provisions adopted by it preclude any conflicting provisions by the Member States.

65 On the other hand, so long as the transitional period laid down in Article 102 of the Act of Accession has not expired and the Community has not yet fully exercised its power in the matter, the Member States are entitled, within their own jurisdiction, to take appropriate conservation measures without prejudice, however, to the obligation to co-operate imposed upon them by the Treaty, in particular Article 5 thereof.

66 It was therefore with good reason that, in Annex VI to The Hague Resolution, after stating that in principle the Member States would not take any unilateral measures pending the implementation of the Community measures, the Council recognized that such measures could be adopted, on an interim basis, if no Community measures had been adopted in time.

67 It is clear therefore that, in view of the failure of the Council and the impossibility of reaching an agreed solution within it, Ireland was entitled to adopt conservation measures for the maritime waters within its jurisdiction provided, however, that they conform to the requirements of Community law.

68 Accordingly the objection raised in Case 88/77 as to the powers of the Irish State at the material time must be dismissed.

Discriminatory character of the Irish measures

69 The Commission contends that, although the Irish measures are based on apparently objective factors, such as size and power of boats, they are in fact discriminatory on two grounds.

70 It would appear that there are scarcely any boats in the Irish fishing fleet which exceed the limits specified in the contested orders, apart from two boats one of which has certainly never fished in the prohibited area, whereas the measure seriously handicaps the fleets of certain other Member States, in particular of France and of the Netherlands.

71 Furthermore the measures create differences of treatment between the various Member States in that the Netherlands fishing fleet, which is mainly made up of large boats is wholly cut off from the waters in question and the same applies, but to a lesser extent, to the French fishing fleet whereas, because of its composition, the British fishing fleet has escaped entirely.

72 Thus, by these measures, Ireland has breached the general non-discrimination rule in Article 7 of the EEC Treaty and the provisions of Article 2 (1) op Regulation (EEC) No 101/76, to which reference was made in Annex VI to The Hauge Resolution.

73 These strictures were supported by the French and Netherlands Governments, which consider that an attack has in this way been made on one of the indispensable foundations of the common fishing policy.

74 The defendants in the main action in Case 88/77 advance the same arguments and emphasize that, in choosing a condition based on the size and power of boats, the Irish measures discriminate against large boats in thus abolishing the advantages associated with the economies of scale arising out of the modernization of the Netherlands fishing fleet.

75 On the other hand the Irish Government points out that the contested measures are based on technical considerations which have nothing whatever to do with the nationality of the boats.

76 The variable effect of these measures is an inevitable result of the composition of the various national fleets concerned and not of the criteria adopted which cannot therefore be described as discriminatory.

77 The Irish Government considers that the advantages which Irish fishermen may obtain from the measures adopted are justified by the fact that the Community itself has repeatedly and right up to The Hague Resolution, recognized the need to encourage the growth of the fishing industry in Ireland.

78 As the Court has had occasion to declare in other contexts, in particular in its judgment of 12 February 1974 in Case 152/73, *Sotgiu* v *Deutsche Bundespost* [1974] ECR 153 the rules regarding equality of treatment enshrined in Community law forbid not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result.

79 This certainly applies in the case of the cirteria employed in the contested measures the effect of which is to keep out of Irish waters a substantial proportion of the fishing fleets of other Member States which have traditionally

fished in those areas whereas under the same measures no comparable obligation is imposed on Ireland's own nationals.

80 These measures are, accordingly, contrary both to Article 7 of the EEC Treaty, which prohibits any discrimination on grounds of nationality, and to Article 2 (1) of Regulation (EEC) No 101/76 under which rules applied by each Member State in respect of fishing in the maritime waters coming under its sovereignty or within its jurisdiction shall not lead to differences in treatment of other Member States.

Remaining submissions

81 The Commission, supported by the French and Netherlands Governments, further maintains that the Irish measures cannot be regarded as genuine conservation measures.

82 It does not appear necessary to resolve that issue since it has been possible to establish that the Irish measures are discriminatory on the basis of the foregoing considerations.

83 During the proceedings various criticisms have been made concerning the conduct of the Irish Government and of the difficulties which it has placed in the way both of the attainment of a common fishing policy and of the protection of the Community's interests in the negotiations with third countries.

84 This last point was specially emphasized by the Commission which has made the effect to the Irish measures on the external negotiations the subject of a separate ground of complaint.

85 In view of the foregoing conclusions it is unnecessary to give a decision on all these complaints.

86 In this connexion it is sufficient to refer to the conclusions reached by the Court in the grounds for its order of 22 May 1977.

87 It follows from the foregoing considerations that, whilst there can certainly be no doubt that, in the absence of appropriate provisions at Community level, Ireland was entitled to take interim conservation measures as regards the maritime waters coming within its jurisdiction, it must be recognized that, because of the discriminatory character of the measures introduced by the orders of the Minister for Fisheries of 16 February 1977, Ireland has

failed to fulfil its obligations under the Treaty and, more especially, under Article 7 of the EEC Treaty and Article 2 of Regulation (EEC) No 101/76.

Costs

88 Under Article 69 (2) of the Rules of Procedure, the unsuccessful party shall be ordered to pay the costs.

89 The defendant has failed in its submissions.

On those grounds,

THE COURT

hereby:

1. **Declares that, by bringing into force the orders of the Minister for Fisheries of 16 February 1977 entitled 'Sea Fisheries (Conservation and Rational Exploitation) Order, 1977' and 'Sea Fisheries (Conservation and Rational Exploitation) (No 2) Order, 1977', Ireland has failed to fulfil its obligations under the Treaty establishing the European Economic Community.**
2. **Orders Ireland to pay the costs of the action, including those of the applications for interim measures.**

Kutscher Sørensen Bosco

Donner Pescatore Mackenzie Stuart O'Keeffe

Delivered in open court in Luxembourg on 16 February 1978.

A. Van Houtte
Registrar

H. Kutscher
President